United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

74-2637

B P/S

To be argued by
EDWARD S. RUDOFSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2637

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

STANLEY SILVER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
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BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York in favor of the Government in the sum of $24,000.00, plus interest and costs. Judgment was entered by the clerk of the district court on October 30, 1974, in conformity with the opinion and order of District Judge John R. Bartels, A. 75a, 384 F. Supp. 617 (E.D.N.Y. 1974), granting summary judgment for plaintiff-appellee pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Issue Presented

Is the fraudulent negotiation, by way of forged endorsements, of United States Government Treasury checks actionable under the Federal False Claims Act, 31 U.S.C. § 231?

Statement of the Facts

Appellee adopts as its statement herein the recitation of the relevant facts set out in the opinion and order of the court below (A. 76a-77a; 384 F. Supp. at 618-619).

ARGUMENT

The District Court properly determined that appellant's actions came within the scope of the Federal False Claims Act, 31 U.S.C. §231.

Appellant contends that his negotiation of treasury checks upon which he uniformly forged the names of the payees was not the presentation of false claims within the meaning of Title 31, United States Code, Section 231. Completely ignoring the exhaustive opinion of Judge Bartels in the District Court, appellant urges that the Act does not apply because, in effect, the payments represented by the checks were actually owed by the Government to *someone, i.e.,* appellant's defrauded subcontractors, and because the Government ultimately lost no public funds by reason of his fraud, inasmuch as the scheme was fortuitously discovered in time for the subcontractors to be made whole (Brief, 9).

It would serve no point to rehash, albeit in different format, the well-reasoned decision of Judge Bartels. We believe that it properly holds: (1) that the presentation of a Government check is the making of a "claim" within the False Claims Act (A. 80a; 384 F. Supp. at 620)[1]; (2) that

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[1] In so holding, the court below relied, *inter alia,* on *United States* v. *Scolnick,* 331 F.2d 598 (1st Cir. 1964). *Scolnick* was similarly relied on in *United States* v. *Branker,* 395 F.2d 881, 889 (2d Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969), where this

[Footnote continued on following page]

appellant's deliberate forgery of the endorsements satisfied the falsity requirement of the statute (*id.*); and (3) that the application of the statute to the circumstances of this case is not diminished because the United States suffered no ascertainable damages (A. 81a; 384 F. Supp. at 620).

We do wish, however, to add to the analysis of the District Court the authority of then Circuit Judge Blackmun's decision in *Kercher* v. *United States,* 409 F.2d 814, 817-818 (8th Cir. 1969), citing, *inter alia,* this Court's decision in *Branker, supra, note 1,* and rejecting appellant's most earnestly advanced contention on this appeal: that the claims herein were not false within the ambit of the statute even though fraudulently tendered (Brief, 14-15).

In *Kercher, supra,* the appellant forged the names of taxpayers to otherwise legitimate claims for federal tax refunds. Notwithstanding the fact that the claims were *valid ab initio, i.e.,* in the sense that the true claimants could have properly presented the same and received payment thereon, Judge Blackmun concluded that proscribed claims had indeed been presented, emphasizing Kercher's knowledge that he was *"wholly unauthorized to present and demand or receive any money on"* the claims. 409 F.2d at 818. (Emphasis in original text.)

Court, in the context of 18 U.S.C. § 287, the criminal analog to Section 231, followed the holding of the *Scolnick* decision, *supra,* to wit: "the endorsement and deposit for collection of a government check to which the depositor was not entitled constitute[s] a false claim. . . ." See also, *Peterson* v. *Richardson,* 370 F. Supp. 1259, 1267 (N.D. Tex. 1973), where the court, citing both *Branker* and *Scolnick, supra,* held that the "act of Dr. Peterson in endorsing these checks and depositing them for collection with the knowledge that he was not entitled to the proceeds . . . constitutes the making of a false claim as to each check" under 31 U.S.C. § 231, the statute here involved.

In coming to this conclusion, the *Kercher* court relied in great measure on the early decision of the Ninth Circuit in *Dimmick* v. *United States,* 116 F. 825 (9th Cir. 1902),[2] which involved the presentation by Dimmick of the claim of a third party, one Selby, for payment based upon supplies provided by Selby to the Government, a fact pattern analogous to that underlying the instant appeal, where appellant Silver presented claims for payments due his subcontractors for work done by them on behalf of the United States. Dimmick raised as a defense to the Government's contention that he had presented a false claim the argument that the character of the claim itself—and not the identity of the claimant—controlled on the issue of falsity. The *Dimmick* court rejected this contention outright in language quoted at some length in *Kercher, supra,* and worthy of repetition in pertinent part at this juncture (116 F. at 828-829):

> The character of the claim—that is to say, whether true, genuine, and honest, or false, and fraudulent—must be determined in view of all of the facts and circumstances attending it. If it be originally forged, or otherwise fraudulently concocted, its presentation for payment, with knowledge of the facts, must necessarily be ficticious and fraudulent. Every whit as much so is a similar demand based upon a claim originally valid, but which the party presenting . . . knows he is wholly unauthorized to present and demand or receive any money on.
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> * * * * *
>
> The suggestion that a stranger . . . can justify his unauthorized and illegal taking of the money . . . is, to say the least, entirely devoid of merit. If it be conceded that the . . . claim . . . remained a

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[2] *Dimmick, supra,* was also relied on in both the *Scolnick* and *Branker* decisions, *supra, note 1* (331 F.2d at 599; 395 F.2d at 889), and by the court below (A. 80a; 384 F. Supp. at 620).

> subsisting, valid claim against the United States, it constituted no true, genuine, or honest claim of the [appellant], or any other stranger . . . , but was, as a basis of any demand by such unauthorized person upon the United States, in the strictest sense false, ficticious and fraudulent.

Appellant Silver admittedly knew that he, too, was "wholly unauthorized to present and demand or receive any money on" the treasury checks involved herein upon which he forged the names of the payees in order to effect negotiation and deposit for collection. Notwithstanding appellant's protestations to the contrary,[3] we believe, therefore, that appellant's actions came within the scope of the False Claims Act, 31 U.S.C. § 231, and that the District Court was correct in its summary judgment to that effect.

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[3] Appellant cites to a number of decisions in support of his contention that, while fraudulent, his actions herein did not violate the False Claims Act; each of these cases, however, deals with one or more "claims" which did *not* involve the actual disbursing of public monies, *e.g.*, *United States* v. *McNinch*, 356 U.S. 595 (1958) (Brief, 9-10), dealing with fraudulent loan *guaranty* applications (*compare United States* v. *Neifert-White Company*, 390 U.S. 228 (1968), where fraudulent applications for *loans* (as opposed to loan *guarantees*) were held false claims within the Act and in which *McNinch* was distinguished), and *United States* v. *Howell*, 235 F.2d 162 (5th Cir. 1956), and *United States* v. *Marple Community Record, Inc.*, 335 F. Supp. 95 (E.D. Pa. 1971), where the "claimants", rather than seeking payments *from* the Government, attempted only to reduce their liability *to* the Government, a crucial distinction which is ignored by appellant herein. Appellant's "authorities", therefore, must be viewed as totally inapposite to this appeal, which is concerned with a scheme whereby appellant *was* successful in getting the Government to part with the public's money.

CONCLUSION

For the reasons hereinbefore set forth, and upon the record and opinion below, the judgment of the United States District Court for the Eastern District of New York in this action should be affirmed.

Dated: Brooklyn, New York
March 18, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of March 1975 he served a copy of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

DiFalco, Field & O'Rourke, Esqs.
605 Third Avenue
New York, N. Y. 10016

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
17th day of March 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4301966
Qualified in Kings County
Commission Expires March 30, 1977